

## **CHAPTER 29-B**

### **CIVILIAN FAMILY SUPPORT ENFORCEMENT MECHANISMS**

#### **I. INTRODUCTION.**

#### **II. CIVILIAN FAMILY SUPPORT ENFORCEMENT MECHANISMS.**

##### **A. Involuntary Allotments.**

##### **1. Citations.**

- a. 42 U.S.C. § 665.
- b. 32 C.F.R. Part 54 (DOD implementing regulations).
- c. 33 C.F.R. Part 54 (Coast Guard implementing regulations).

##### **2. Basic requirements for initiation of an involuntary allotment.**

- a. A state court or administrative support order that includes a child support component.
- b. An arrearage equal to or exceeding the support required for a 2-month period.

##### **3. Procedure.**

- a. A state (but not a foreign) child support enforcement agent (or court) sends a letter (or order) to the military finance center stating that the requisite arrearage exists and requesting that a "mandatory allotment" be started.
- b. The finance center notifies the member's commander and the member concerning the request.
- c. Absent presentation of an adequate and timely defense by the soldier, the allotment is started.
  - (1) The allotment will be for the amount of the monthly support obligation, payable in accordance with the request and continuing until the requester advises that it should stop.
  - (2) Arrearages can be collected, but there must be second court order requiring payment of the arrearage by involuntary allotment (a letter from a CSE agent asking for arrearages is insufficient).

4. Limitations.

- a. If the member is supporting other family members, the maximum amount of the involuntary allotment is 50% of disposable earnings.
  - (1) "Disposable earnings" is basic pay plus most bonuses and special pay, minus taxes and other deductions.
  - (2) The term also includes BAS for officers and warrant officers, and BAQ for members with dependents and all members in the grade of E-7 and above. See 32 C.F.R. § 54.6(b).
- b. If the member is not supporting other family members, the maximum is 60% of disposable earnings.

- c. An additional 5% is tacked on to the maximum (i.e., the maximum is boosted to 55% or 65%) if "the total amount of the member's support payments is 12 or more weeks in arrears." 32 C.F.R. § 54.6(a)(5)(iii).

5. Strategies for the member.

- a. Show that information in the request is in error. 32 C.F.R. § 54.6(d)(5).
  - (1) Member must submit an affidavit and evidence to support the claim of error.
  - (2) Must provide this information to the finance center within 30 days of the notice sent by the finance center.
  - (3) Examples of errors.
    - (a) The arrearage does not equal or exceed 2 months' worth of support.
    - (b) The support order itself has been amended, superseded, or set aside.
- b. Are defects in jurisdiction that affect the validity of the underlying support order a defense? It is unclear whether the finance center will act on such an allegation.
- c. Negotiate a mutually acceptable resolution with the child support agency or the custodial parent.
- d. Do not start a voluntary support allotment upon receiving notification of an involuntary allotment action--the result will simply be two allotments deducted from military pay.

6. Helping the custodial parent.

- a. He or she must first have a child support order issued by (or registered with) a U.S. court.
- b. Two approaches to getting an involuntary allotment.
  - (1) Ask the applicable CSE agency to submit the request.
    - (a) "Applicable" agency does not have to be the state where the order was issued.
    - (b) This approach usually works well if the order calls for payments to be made through the court or agency so they have a record of the arrearage.
    - (c) Problems develop if the agency has no payment records; however, some may be willing to act on a sworn affidavit of nonsupport supplied by the custodial parent.
  - (2) Or, submit a request directly to the court that issued the order, asking it to request initiation of an involuntary allotment.
    - (a) The court will need a sworn representation from the custodial parent alleging the appropriate arrearage.

B. Garnishment for Family Support.

- 1. References.
  - a. 42 U.S.C. § 659-662.
  - b. 5 C.F.R. Part 581.
  - c. 1993 Garnishment Equalization Act.

2. Historically, there was no "federal garnishment law."
  - a. The garnishment statute is merely a waiver of federal sovereign immunity, allowing state garnishment orders to be served on federal officials.
  - b. The garnishment statute applies to active duty and retired military pay, reserve drill pay, and current and retired federal civilian employee salaries.
  - c. The federal statute currently provides that federal agencies need only comply with garnishment order for child support or alimony obligations.
  - d. The garnishment can be for current support, or support arrears, or both, according to state law.
  - e. The ceiling on the amount subject to garnishment is the lower of state law or the limits stated in the federal Consumer Credit Protection Act (CCPA) (15 U.S.C. § 1673).
    - (1) CCPA provides for garnishment of a maximum of 50% of disposable earnings if the member is supporting other family members and 60% if he or she is not; an additional 5% can be garnished if the support obligation is more than 12 weeks in arrears.
    - (2) Disposable pay includes basic pay and most bonus and special pay entitlements, but not BAQ or BAS.
3. Defenses for the member.
  - a. The finance center will not entertain defenses raised by the member in garnishment actions from U.S. courts.
  - b. Disputes must be litigated in the state that issued the garnishment order.

- c. If the member is supporting family members other than those to whom the garnishment order pertains, make sure the finance center knows this since it can affect how much money is deducted from the member's pay.
- 4. German garnishment orders.
  - a. The finance center honors support garnishments issued by German courts against members (and family members, etc.) while they are stationed in Germany.
  - b. The garnishment should stop upon the member's reassignment out of Germany.
  - c. Members need to understand that termination of the German garnishment upon DEROS does not terminate the underlying support obligation.
    - (1) German agencies can later pursue collection of current support and arrearages through U.S. courts.
    - (2) German courts will collect current support and arrearages (through garnishment) if the member is later reassigned to Germany.
- 5. "Garnishment Equalization Act." Access to Government Employee Pay Opened Up to Non-Family Support Creditors.
  - a. Impact on family support creditors minimal. Family support garnishments have priority.
  - b. Family creditors may also benefit.

C. Wage Assignment Orders.

1. These are created by state law and can be used to enforce support obligations against civilian and military parents.
  - a. The trigger for a wage assignment generally is an arrearage of not more than 30 days.
    - (1) Some states currently have automatic wage withholding that takes effect immediately upon issuance of the support order, whether or not there is an arrearage.
    - (2) The Family Support Act of 1988 requires that all states implement automatic wage withholding in phases (based on varying categories of obligees) by 1994.
  - b. In cases involving contingent withholding provisions, the absent parent receives notice of intent to initiate a wage assignment and, if no defense is presented (i.e., disputing the arrearage), notice of assignment is sent to the employer.
  - c. All employers must honor wage assignment orders; DOD agencies process them as if they were garnishment orders.
2. Assisting the absent parent.
  - a. Upon receipt of notice to initiate a wage assignment...
    - (1) Notify the agency of any error in alleged arrearages.
    - (2) Notify the agency of modifications of the underlying support order or other facts which negate the support obligation.
  - b. Ensure the finance center knows that the soldier is supporting other family members.

- c. If a soldier is paying support by allotment and a decree or support order is pending in a state with automatic wage assignments, stop the allotment several months before the decree will be issued.
- 3. Assisting custodial parents obtain support--refer them to the nearest state or county child support enforcement office. **See Section IV.**

D. Uniformed Services Former Spouses' Protection Act.

- 1. Citations.
  - a. 10 U.S.C. § 1408.
  - b. 32 C.F.R. Part 63.
- 2. In effect, the USFSPA's "direct payment" provisions authorize wage withholding against military retired pay for support enforcement.
  - a. The support obligation must be contained in a final decree of divorce, dissolution, annulment, or legal separation; a simple support order or paternity decree is not sufficient.
  - b. The custodial parent simply sends the appropriate finance center a request for direct payment.
    - (1) The controlling statutory provision is 10 U.S.C. § 1408(d).
    - (2) The maximum amount recoverable under a USFSPA direct payment is 50% of disposable retired pay.
  - c. There is no requirement that any arrearage be accrued.
  - d. Alternatives mechanisms.
    - (1) Garnishment.



- (2) State wage assignments (if state law defines "wages" broadly enough to encompass retired pay).

E. The Uniform Interstate Family Support Act (UIFSA) - URESA's replacement has been adopted by all 50 states as of 1 January 1998.

1. Copies of the UIFSA are available in hard copy or e-mail from the National Conference of Commissioners on Uniform State Laws, 676 North St. Clair Street, Suite 1700, Chicago, Illinois 60611, telephone (312) 915-0195.

### **III. HELP FOR CUSTODIAL PARENT SOLDIERS SEEKING CHILD SUPPORT.**

A. Soldiers can use the "IV-D" program in the state in which they are assigned. See 42 U.S.C. §§ 651-657 (1988).

B. Under the IV-D program, for a minimal fee -- not exceeding \$25.00, a state's attorney will pursue the soldier's support claim, even if the non-supporting ex-spouse is located in a different state.

C. The IV-D program requires that all states enact a wide variety of tools to ensure that adequate levels of child support are ordered and paid. States are now required to have legislation authorizing:

1. Income tax refund intercept programs to collect arrearages in IV-D cases.
2. Recording of personal and real property liens to enforce child support obligations.
3. The reporting of child support arrearages exceeding \$1000 to credit bureaus upon request of any consumer reporting agency.

4. Absent special circumstances, immediate wage withholding in all IV-D cases in which a child support order is issued or modified after November 1, 1990, and in all cases in which a new child support order is issued on or after January 1, 1994.
5. Promulgation, and revision, at least every four years, of child support guidelines with the force of rebuttable presumptions.
6. Periodic review and adjustment of IV-D child support orders pursuant to the state's support guidelines.
7. Genetic testing provided upon the request of either party to a contested paternity action.

#### **IV. PROCEDURAL ISSUES IN FAMILY SUPPORT ENFORCEMENT.**

##### **A. Jurisdiction--Who Has It?**

1. UIFSA has extensive long arm jurisdiction.
2. UIFSA long-arm jurisdiction.
  - a. Past domicile in the state with the child
  - b. Residence in the state and providing prenatal expenses or support to the child.
  - c. Sexual relations leading to conception.
  - d. Consent.
  - e. Child resides in the state as a result of the acts or directives of the nonresident individual.

3. Long-Distance Service of Process.

a. Personal Service. Generally required in all states for initial case of support or paternity.

(1) Personal service of process within the United States. All services prevent military personnel from acting as process servers. However, on concurrent jurisdiction and exclusive federal jurisdiction installations (where the state reserved the right to serve process) all services allow for state process servers subject to appropriate time, place and manner restrictions.

(2) Personal service of process overseas. All services prevent their military personnel from being process servers. Generally, the servicemember is offered the opportunity to voluntarily accept service of process. (See, e.g., Army Regulation 27-40, Litigation) Otherwise, service of process must be accomplished through international agreements like the Hague Convention.

b. Service by mail.

(1) Service by military mail (i.e., APO and FPO) may be sufficient under state law.

(2) Service by regular mail to overseas locations may be invalid (depending on state law), and it is illegal in some countries.

4. The Hague Convention on the Service of Judicial and Extrajudicial Documents Abroad.

a. Cite: TIAS 6638, 20 UST 361, 15 Nov 65.

b. Text reprinted in:

- (1) Martindale-Hubbell, Volume VIII.
- (2) Appendix to Fed. Rule of Civil Procedure 4, West's U.S. Code Annotated (U.S.C.A.).

c. Procedure.

- (1) For signatory nations, plaintiff's attorney fills out a request on a Form USM 94, Request for Service Abroad of Judicial or Extrajudicial Documents, available from the nearest U.S. Marshall's Office, and mails it with documents to the "Central Authority" for country where the defendant resides, and it is served in accordance with local law.
  - (a) For service on a person in Great Britain or Israel, there must be a court order requiring the service, and the documents should be mailed by the clerk of the court.
  - (b) If serving a soldier in Germany, documents should reflect soldier status to ensure service through NATO SOFA channels.
- (2) Some documents may have to be translated into local law; U.S.C.A. materials explain this.
- (3) The coordinating agency in the U.S. is the Department of Justice. Addresses and other information are available in U.S.C.A. and from the Department of Justice Office of Foreign Litigation in Washington, D.C. at (202) 514-7455.

d. For assistance regarding nonsignatory nations and for problem cases, contact the Office of Citizens Consular Services at (202) 647-3444.

5. Service of process from U.S. courts by consular personnel--they will not provide this service unless expressly authorized to do so by the State Dept.

6. Commercial services - check state bar journals and national process servers associations and listings.

B. Avoiding the Need for Long-Distance Service.

1. Ask the CSE agency for the state or country where the absent parent lives, or perhaps where the custodial parent is domiciled, to handle the case.
2. In Germany there are two other approaches involving host-nation agencies.

- a. Seek the assistance of:

Deutsches Institut für  
Vormundschaftswesen  
Postfach 10 20 20  
69010 Heidelberg  
Federal Republic of Germany  
011-49-6221-98-18-25  
FAX: 011-49-6221-98-18-28

- (1) A quasi-governmental agency.

- (2) Operates on an informal or semi-formal mutually cooperative basis with a number of states and foreign nations in child support matters.

- b. Or, if the state where the absent parent resides has an agreement with Germany, seek the assistance of:

Generalbundesanwaltschaft  
beim Bundesgerichtshof  
Zentrale Behörde -  
Neuenburger Str. 15  
10969 Berlin  
011-49-30-25-96-1  
FAX: 011-49-30-25-96-397

- (1) These agreements bring the German government CSE agency within URESA and RURES.A.
- (2) As of 7 January 1997, the following 47 states have reciprocal agreements with the FRG: AK, AZ, AR, CA, CO (child support only), CT, DE, FL, GA, HI, ID, IL, IA (child support only), IN, KS, KY, LA, MA, ME, MD, MI, MN, MO, MT, NE, NV, NJ, NM, NH, NY, NC, ND, OH, OK, OR, PA, RI, SD, TN, TX, UT, VT, VA, WA, WI, WV, & WY.

C. Obtaining Evidence in International Cases.

1. Consider the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters.
  - a. TIAS 7444, 23 UST 2555, 18 Mar 1970.
  - b. Text and sample form available at 28 U.S.C.A. § 1781.
    - (1) Any court of a signatory nation can send a "letter rogatory" to a court of another signatory nation. The "letter" asks the receiving court to order a person within its jurisdiction to produce evidence.
    - (2) This treaty has been used by German courts in paternity actions to obtain blood samples from putative fathers located in the U.S.

D. Avoiding Problems with the Soldiers' and Sailors' Civil Relief Act.

1. Stay of Proceedings (50 U.S.C. app. § 521).
  - a. Who? - any active duty defendant or plaintiff.
  - b. What Proceedings?

(1) Civil Court Hearings - yes.

(2) Bankruptcy Debtor/ Creditor Meeting - yes.

(3) **Administrative Hearing - no.**

c. When may you request a stay?

d. Duration of stay.

e. Burden of Proof - The Military Member must show by a preponderance of the evidence that military service has adversely affected the ability to appear, *Boone v. Lightner*, 319 U.S. 561 (1943).

(1) Unsuccessful attempts.

(a) *Underhill v. Barnes*, 288 S.E. 2d 905 (1982) - soldier made no showing of attempt to request leave, court took judicial notice of leave statutes and regulations and assumed he had 50 days accrued based on leave accrual and length of service.

(b) *Palo v. Palo*, 299 N.W. 2d 577 (S.D. 1980) - both parties were service persons assigned to Germany. Wife took excess leave and emergency loan to travel to CONUS for hearing. Husband made no showing of inability to do the same.

(2) Successful Attempt - *Lackey v. Lackey*, 278 S.E.2d 811 (Va. 1981) - sailor deployed at sea sends affidavit from superior officer attesting to inability to appear.

- (3) Problem - Courts sometimes find the service person is not a necessary party and therefore their rights are not materially affected by inability to appear. *Bubac v. Boston*, 600 So.2d 951 (Miss. 1992). Military father not necessary party in proceeding by mother challenging retention of kids by paternal grandmother.
  - (a) *Shelor v. Shelor*, 383 S.E.2d 895 (Ga. 1989). As general rule, temporary modifications of child support do not materially affect rights of military defendant as they are interlocutory and subject to modification.
  - (b) *Riley v. White*, 563 So.2d 1039 (Ala. Civ. App. 1990). Trial court did not abuse discretion in refusing putative father's request for stay, after father left with military unit for overseas duty without submitting to required blood test. Father was aware of proceedings, was represented by attorney, received previous delay and left for Germany without informing court.

E. Default Judgments (50 U.S.C. app. § 520).

1. Affidavit.

- a. Must be prepared and filed by plaintiff.
- b. Effect of failure to file = voidable judgment.
- c. Court-Appointed Attorney.
  - (1) Purpose - at a minimum, determine if requesting a stay is appropriate.
  - (2) Compensation?



(3) Effect of failure to appoint = voidable judgment.

2. Reopening Default Judgments, 50 U.S.C. app. § 520(4) .

a. Judgment must have been entered during term of service or within 30 days after termination of service.

b. Application must be made to court during term of service or within 90 days of termination.

c. The service person cannot have made any appearance.

(1) Filing an answer either pro se or through counsel is an appearance.

(2) Letter from Legal Assistance Attorney to court may be an appearance!

(3) Some things are not appearances:

(a) Letter from Commander to court. *Cromer v. Cromer*, 278 S.E.2d 518 (N.C. 1981) (court does not explicitly rule on re-opening under the SSCRA, but does remand case "in the interests of justice").

(b) Letter to opposing counsel.

d. Criteria to re-open default.

(1) Military service prejudiced ability to defend, AND

(2) Meritorious Defense - Defendant must reveal the defense to all or part of the original action.

## V. ANALYSIS OF DEFENSES TO SUPPORT OBLIGATIONS.

### A. Inability to Pay.

1. Federal law requires states to treat each monthly support payment as a judgment when it becomes due. 42 U.S.C. § 466(a).
  - a. Payments must be enforceable as judgments.
  - b. Payment/judgments must be entitled to full faith and credit.
  - c. Payment/judgments must not be retroactively modifiable.
2. Consequently, an obligor should immediately get a support order amended if (s)he suffers a change in financial circumstances; arrearages cannot be excused. Current problem -- reservists.

### B. Interference With Visitation.

1. General rule: interference with visitation rights is not a defense to nonpayment of support.
2. Concealment of a child to prevent visitation may have a different result when arrearages are sought. E.g., Washington ex rel. Burton v. Leyser, 196 Cal. App. 3d 435, 241 Cal. Rptr. 812 (1987) (based on estoppel and waiver theories, court denied custodial parent's request for arrearages for a period of time during which she had concealed the child from the father).

### C. Emancipation of Children.

1. Effect of emancipation on support orders.
  - a. In some jurisdictions, the support order can remain in effect until it is modified, regardless of the child's age.

(1) Explicit: "Pay child support of \$150 per month until further order of this court"

(2) Ambiguous: "Pay child support of \$150 per month."

b. In other jurisdictions, the support obligation automatically terminates at the age of majority, regardless of the wording of the court order (unless the order is based on an agreement between the parties).

2. Emancipation due to marriage and childbirth: these events do not necessarily terminate a support obligation.

a. An annulment of a marriage while the child is under the age of majority may revive the parents' support obligation. Eyerman v. Thias, 760 S.W.2d 187 (Mo. Ct. App. 1988).

b. A minor child's giving birth may not constitute an emancipation event for support purposes. Doerrfeld v. Konz, 524 So.2d 1115 (Fla. Dist. Ct. App. 1988).

3. Emancipation and arrearages: emancipation may affect the custodial parent's ability to enforce a support obligation after the child has reached the age of majority.

D. Payment Other Than As Ordered by the Court.

1. Mutual agreement to terminate payments.

a. Problem: honoring such an agreement ignores the strictures concerning retroactive modifications, but it also provides the custodial parent a financial windfall.

2. Mutual agreement to change custody.

- a. Problem: honoring such an agreement violates strictures against retroactive modifications, but ignoring it provides the custodial parent with a financial windfall.

## **VI. THE IMPACT OF EXECUTIVE ORDER 12953.**

- A. Designation of the Executive Department as a "Model Employer" for Purposes of Facilitating Child Support Enforcement.
- B. No Exemption for DOD.
- C. Designation of Agency Points of Contact for Assistance with Service of Process on Agency Employees.

## **VII. WELFARE REFORM ACT.**

- A. President Clinton signed the Welfare Reform Act 22 August 1996.
- B. MAJOR changes in child support enforcement under Title III of the Act.
  - 1. Establishing Paternity.
    - a. Voluntary acknowledgments.
      - (1) Offered in all hospital births.
      - (2) A signed voluntary acknowledgment of paternity is a legal judgment 60 days later--subject to challenge only for fraud, duress or material mistake of fact.
      - (3) Health & Human Services will specify minimum requirements for an affidavit of voluntary establishment of paternity.

- b. Coordination of acknowledgments with birth records.
  - (1) A father must establish paternity either voluntarily acknowledging or in a legal process to include his name on the birth certificate.
  - (2) Birth record agencies must offer voluntary paternity establishment services as well as hospitals.
- c. Streamlined legal processes.
  - (1) Requires a party seeking or opposing paternity to set forth in a sworn statement reasonable facts supporting the existence or nonexistence of requisite sexual contact before genetic testing.
  - (2) States must pay costs of genetic testing ordered by a State agency with possibility of recoupment.
  - (3) Directs states to reform evidentiary rules making genetic tests and voluntary acknowledgments of paternity more easily admissible.
  - (4) Prohibits right to jury trial in paternity cases.
- d. Cooperation determinations.

2. Child Support Provisions.

- a. General Enforcement Provisions.
  - (1) License and passport revocation laws.
  - (2) Denial of other federal benefits to delinquent noncustodial parents.

- b. Automation and Location of Delinquent Parents.
    - (1) Expands the Federal Parent Locator Service.
      - (a) Federal Case Registry of Child Support Orders.
      - (b) National Directory of New Hires.
    - (2) State Registries.
      - (a) Each state must establish a central state case registry of support orders or modifications.
      - (b) State Directory of New Hires.
    - (3) Centralized State Disbursement Units.
  - c. Uniform Laws.
    - (1) Adoption of Uniform Interstate Family Support Act.
    - (2) Full Faith and Credit for Child Support Orders Act strengthened.
    - (3) Uniform forms developed by Health and Human Services.
- C. Enforcement of Support Obligations Directed at Military Members.
- a. DOD locator system.
  - b. New hire registry.

- c. Regulations facilitating the granting of leave for support hearings.  
No SSCRA protection for administrative hearings.

## **VIII. CONCLUSION.**





## APPENDIX

### ***REQUIREMENTS AND REMEDIES***

<b>TYPE</b>	<b>Obligor Receives Notice</b>	<b>Defense s</b>	<b>Pay Subject</b>	<b>Limits</b>	<b>Arrears</b>	<b>Time Limits</b>	<b>Collect Court Costs</b>
<b>IA</b>	Yes	No Arrears or Mod	AD Pay Only(1)	CCPA (50- 65%)(2)	Yes Need 2d Court Order	None	No
<b>GAR</b>	? of State Law	? of State Law	Pay only(3)	Lower of State or CCPA	? of State Law	? of State Law	If Court orders as a Spt Oblig.
<b>WAO</b>	Yes	No Arrears or Mod	Pay Only (3)	Lower of State or CCPA	No	None	No
<b>FSPA</b>	No	No	Dispos- able Retired pay	50% D.R.P.	No	None	No

**NOTES:**

(1) Basic, BAS, BAQ (with dependents and all soldiers E-7 and above), Bonus

(2) CCPA allows max of 50% if obligor is supporting other family members--60% if not. Add an additional 5% if more than 12 weeks in arrears

(3) Basic, Bonus

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